IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALPINE QUALITY CONSTRUCTION SERVICES, INC., a Washington corporation, Appellant, And STEVEN A. WEISS and LINDA I. MILLER, husband and wife, and their marital community, Plaintiffs-Intervenors, v. BRETT JOHNSON and TERESA JOHNSON, husband and wife, and their marital community, Respondents.	No. 32153-0-II Consolidated with:
ALPINE QUALITY CONSTRUCTION SERVICES, INC., a Washington corporation, Plaintiff, And STEVEN A. WEISS and LINDA I. MILLER, husband and wife, and their marital community, Appellants, Plaintiffs-Intervenors, v. BRETT JOHNSON and TERESA JOHNSON, husband and wife, and their marital community, Respondents.	No. 33093-8-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Alpine Quality Construction appeals the trial court's judgment,

which held that Brett and Theresa Johnson did not violate a subdivision's covenants when they placed a modular home on their lot. Among other things, we hold: (1) that an exception in the covenants, which permitted prefabricated homes on an individual basis with developer approval, was ambiguous; (2) that Alpine approved the Johnsons' modular home for the subdivision; (3) that vinyl siding on the home did not violate the covenants; and (4) that a bulldozer on site violated the covenants and must be removed. Steven Weiss and Linda Miller (Weiss-Millers), purchasers in the subdivision, also appeal the trial court's denial of their CR 60 motion, but we find their claim is meritless.

Because we do not have a record of whether Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, as required by the covenants for an award of attorney fees and costs, we remand the award for an entry of findings of fact and conclusions of law. Should the trial court find that Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, the Johnsons will be entitled to reasonable attorney fees and costs, both at trial and on appeal, as the prevailing party under the covenants. Nevertheless, because we independently find that the Weiss-Millers' appeal was meritless and brought in bad faith, we hold that the Johnsons currently are entitled to reasonable attorney fees and costs for responding to the Weiss-Millers' appeal.

Therefore, we affirm in part, but remand for findings of fact and conclusions of law regarding the award of attorney fees and costs at trial.

I. FACTS

In 2000, Brett and Teresa Johnson contacted Terry Ryan, president and owner of Alpine Quality Construction Services, Inc., and told him that they wanted to purchase a lot in the Riverview Meadow subdivision.[1]

On April 22, 2000, the Johnsons, accompanied by a family friend, met with Ryan. During this meeting, the Johnsons discussed their plans to place a modular home, built by The Legacy Corporation (TLC Modular Homes), on lot 7. They showed Ryan many documents, which included: promotional materials, drawings, floor plans, and a materials specifications list, for their modular home. The materials list included interior and exterior construction materials and components, such as vinyl siding.

During this meeting, the Johnsons and Ryan also reviewed the unrecorded covenants. The Johnsons understood that the unrecorded covenants prohibited all manufactured homes, mobile homes, modular homes, prefabricated homes, and similar structures on any subdivision lot. But, because they were planning to purchase a modular home, the Johnsons expressed their concern about these prohibitions to Ryan.

[1] This subdivision, which consists of 12 lots, is located near Stevenson in Skamania County.

According to the Johnsons, Ryan indicated that he would allow them to place the modular home on lot 7. Thus, Ryan assured the Johnsons that he would amend the covenants before he recorded them.[2]

According to Ryan, he indicated that he would allow the Johnsons to place the modular home on lot 7, subject to certain conditions. One of these conditions was that Ryan needed to approve the plans and specifications of the home.

After these discussions, the Johnsons signed an earnest money agreement to purchase lot 7 in the subdivision.

On May 18, 2000, Ryan recorded the covenants, which allowed prefabricated homes to be placed on the subdivision lots on an individual basis with developer approval.[3]

On July 18, 2000, the Johnsons took title to lot 7. During July, August, and September, the Johnsons prepared the lot by clearing it of trees and underbrush. They began preparing and excavating for the daylight basement in October. By the time the modular home units arrived in February 2001, the daylight basement was complete. During this time, Ryan frequently visited the construction site.

According to Ryan, the Johnsons had yet to provide him with any plans and specifications

[2] The Johnsons admit that they reviewed only the unrecorded covenants. They never reviewed the covenants before closing to determine whether Ryan actually amended and recorded the covenants. In fact, the Johnsons were not aware of the amended and recorded covenants until the middle of February 2001, when this dispute arose.

[3] On June 9, 2000, Ryan signed another version of the covenants, but this version retained the amendment that allowed for prefabricated homes to be placed on the subdivision lots on an individual basis with developer approval.

of their home; in fact, the Johnsons did not provide him with anything until March 2001. And Ryan never explicitly approved the plans and specifications of the Johnsons' home.

But, according to Mr. Johnson, he did not seek Ryan's approval of the plans and specifications because, "I thought I already had it." 7 Report of Proceedings (RP) (May 24, 2004) at 875. And regardless, Ryan never asked to see the plans and specifications of their home, except on two occasions. In September, Ryan met with Mr. Johnson and discussed the home's roofing composition. In early 2001, at a local gas station, Ryan asked Mr. Johnson if he could view the home's blueprints. Mr. Johnson offered to retrieve them from his vehicle, but Ryan said that he would have to view them at a later date. Upon leaving, Mr. Johnson encouraged Ryan to view the home's blueprints at the construction site. But Ryan failed to do so. And, although he had other opportunities to review the home's blueprints, Ryan admitted that he never reviewed them.

In early February 2001, Mr. Johnson informed Ryan that the modular home would be arriving in a week. And Ryan gave Mr. Johnson permission to store the modular home units on the subdivision road for a few days and to lock the gate at the entrance to the subdivision road.

On February 12, 2001, the first modular home unit arrived. According to the Johnsons, Ryan arrived at the lot and talked to Mr. Johnson for almost 30 minutes. Ryan was excited about the arrival of the modular home. But, according to Ryan, he was surprised and upset that the Johnsons were assembling a modular home with vinyl siding. Later that evening, Ryan informed Mr. Johnson that he would not be able to place the modular home on the lot and that the vinyl

siding was unacceptable.

Weiss stated that he also had witnessed the arrival of the first modular home unit. Weiss complained to both Ryan and Ginger Townsend, Alpine's real estate agent, about the modular home and the vinyl siding. To allay Weiss's fears, Ryan responded that the Johnsons' home would "be fine" when completed. 3 Clerk's Papers (CP) at 437; 5 RP (Mar. 31, 2004) at 539-42.

But on February 13, 2001, with assistance from counsel, Ryan sent a letter to the Johnsons, requesting them to cease and desist from any further assembly of the home because it violated the covenants. Ryan claims that the Johnsons replied to his letter by stating, "[S]ue me." 2 RP (Mar. 29, 2004) at 142.

On February 23, 2001, Ryan sent another letter to the Johnsons, in which he requested documents and raised concerns regarding the appearance of the lot. The Johnsons ignored this letter. The Johnsons also ignored letters from Ryan's counsel and even ignored letters that were delivered to them in care of Brad Andersen, who was attempting to mediate the matter.[4]

Thus, on May 4, 2001, Alpine filed a complaint for injunctive relief and for damages, alleging that the Johnsons violated the covenants. The Weiss-Millers moved to intervene; the trial court granted their motion.

After a six-day bench trial in March and May of 2004, the trial court ruled in favor of the Johnsons. The trial court entered findings of fact, conclusions of law, and a judgment on July 16, 2004. The trial court awarded attorney fees to the Johnsons. Alpine moved for entry of

[4] The parties attempted to informally and formally mediate through Andersen before Alpine filed its complaint.

additional findings of fact and conclusions of law, but the trial court denied the motion. Alpine also moved for a new trial, which the trial court denied. Alpine timely appealed.

Believing that Alpine's appeal would dispose of the entire case, the Weiss-Millers did not file a timely appeal. Instead, the Weiss-Millers sought relief from the judgment under CR 60(b)(3) and (11). The trial court denied the Weiss-Millers' CR 60(b)(3) and (11) motion and entered a supplemental judgment against them for additional attorney fees. The Weiss-Millers timely appealed from the trial court's denial and supplemental judgment.

II. EVIDENTIARY RULINGS

Alpine argues that the trial court erred in allowing Andersen to testify under ER 408.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). We may affirm on any ground adequately supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

ER 408 states in part:

> Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Here, Andersen initially acted as an informal "conduit" between Ryan and the Johnsons in order to facilitate a settlement of their dispute. 2 RP at 207, 211; Br. of Appellant at 20. When this informal settlement failed, Alpine and the Johnsons sought a more formal mediation with Andersen.

Alpine argues that the Johnsons used Andersen's testimony to impeach Ryan's testimony. And Alpine contends, "Clearly, Andersen learned of these alleged Ryan statements while he was acting as a 'settlement conduit' for the parties." Br. of Appellant at 22. Thus, Alpine concludes that Andersen's testimony "was inadmissible under ER 408 because it was evidence derived from the settlement process between the parties." Br. of Appellant at 22.

But Alpine offers only conclusory statements about how Andersen learned of Ryan's statements. Alpine fails to recognize that Andersen could have learned of these statements *before* the settlement negotiations. And Alpine fails to recognize that ER 408 does not bar statements made outside the context of settlement negotiations. *See* 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 408.8, at 57-61 (4th ed. 2005). In fact, Alpine, Andersen, and the Johnsons agreed that Andersen could testify to matters that occurred before the settlement negotiations.[5] And consistent with this agreement, the trial court ruled that Andersen "could testify on matters that occurred before mediation session was agreed upon." 2 RP at 215-

[5] In section six of the mediation agreement, Alpine, Andersen, and the Johnsons agreed that:

> The Mediator may not be called to testify as a witness (except to testify to matters that occurred *before* a mediation session was agreed upon), consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not Parties to the mediation.

Ex. 68 at 2 (emphasis added).

16.

Alpine next asserts that Andersen derived his testimony from the settlement process between the parties. And Alpine asserts that the trial court admitted Andersen's testimony under ER 408. Alpine also argues that the trial court erred in admitting Andersen's testimony because it was irrelevant under ER 401 and unfairly prejudicial under ER 403.

While ER 408 excludes evidence of settlement negotiations when offered to prove liability, courts may admit this evidence to prove bias or prejudice. *Northington v. Sivo*, 102 Wn. App. 545, 549, 8 P.3d 1067 (2000). Nevertheless, this evidence of settlement negotiations must satisfy all other evidentiary rules. *Northington*, 102 Wn. App. at 549.

Assuming, without deciding, that Andersen's testimony was: (1) derived from the settlement negotiations between the parties; (2) irrelevant; and (3) unfairly prejudicial, we would not reverse because the error was harmless. *See Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal and will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial).

The trial court would have reached the same conclusion even if it had excluded Andersen's testimony regarding when the Johnsons showed Ryan the home's plans and materials list. Mr. Johnson, Mrs. Johnson, and Ben Sciacca all testified that the Johnsons showed Ryan many documents about their home, which included: promotional materials, drawings, floor plans, and a materials specifications list. And Mr. Johnson testified about two occasions when Ryan asked to see the plans and specifications of their home.

Thus, whether the trial court admitted Mr. Andersen's testimony under ER 408 or not, there is no reversible error.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. General Standard of Review

We review the trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings of fact in turn support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Props.*, 96 Wn.2d at 719. We review de novo the trial court's conclusions of law. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001).

B. Interpretation of the Covenants

Our primary objective in interpreting the covenants is determining the intent of the original parties. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005); *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). And whether we apply the rules of strict construction or liberal construction in interpreting the covenants depends on the status of the parties.

Our Supreme Court expressly acknowledged that:

> where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among *homeowners* in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those purposes intended by the covenants.

Riss, 131 Wn.2d at 623 (emphasis added). But, "[c]onstruction against the grantor who presumably prepared the deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon." *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993). And in *Lakes at Mercer Island Homeowners Association v. Witrak*, 61 Wn. App. 177, 180, 810 P.2d 27, *review denied*, 117 Wn.2d 1013 (1991), Division One of this court stated, "While [rules of strict construction] may have some validity when the conflict is between a homeowner and the maker of the covenants, it has limited value when the conflict is between homeowners."

Because Alpine is the grantor of the covenants and initiated this dispute, the trial court should have applied the rules of strict construction in interpreting the covenants. But whether the trial court decided to apply rules of strict construction or liberal construction is of little significance. After all, we give the covenants' language its ordinary and common meaning. *Riss*, 131 Wn.2d at 621. And we construe the covenants in their entirety. *Riss*, 131 Wn.2d at 621. Finally, we may resolve any ambiguity as to the intent of the original parties who established the covenants by considering evidence of the surrounding circumstances. *Riss*, 131 Wn.2d at 623.

C. Approval of the Johnsons' Home

Alpine essentially argues that the trial court erred in its interpretation of article 1, paragraph 10 of the covenants by treating modular homes as the equivalent of prefabricated homes. Among other things, Alpine assigns error to the trial court's finding of fact that "both Mr. Ryan and the Johnsons considered the Johnson's [sic] home to be 'prefabricated.' The parties considered it a prefabricated house, drawing no distinction between prefabricated and modular." 5 CP at 917. And Alpine claims that Ryan never made an exception for the Johnsons' home.

Article 1, paragraph 10 of the covenants states:

> The use, placement or storage of mobile homes, modular or prefabricated homes, or manufactured homes, or similar structures, which are largely constructed off sight [sic] as living units, are prohibited. An exception for prefabricated home[s] can be considered if they meet the construction standards, on an individual basis by the developer.

Ex. 7 at 2.

Using this language, Alpine argues that it intended to ban mobile homes and modular homes from the subdivision because they are inconsistent with the intent to create a "high-end" subdivision. Br. of Appellant at 29. Alpine also argues that because the trial court ignored the statutory definitions of modular, manufactured, mobile, and prefabricated homes, it failed to implement the covenants' intent.

We find that the covenants' language is ambiguous because "modular" homes may be equated with "prefabricated" homes. Thus, after examining the covenants' language, our questions are three: (1) Did Alpine intend to use the terms modular and prefabricated interchangeably? (2) Did Alpine intend to make an exception only for the subcategory of prefabricated homes? and (3) Did Alpine intend to make an exception for both modular and prefabricated homes? Given the ambiguity of Alpine's intent, we agree that the trial court correctly looked beyond the document to ascertain intent from the surrounding circumstances. Therefore, we review whether substantial evidence supports the trial court's finding of fact.

Here, the evidence showed that Alpine never distinguished between the definitions of modular homes, prefabricated homes, or manufactured homes before the trial. In his deposition, Ryan admitted, "I told [Mr. Johnson] that if he was going to put in a *modular* home, that it would have to comply, and it would have to appear to be suitable." 2 CP at 263 (emphasis added). When asked if he had ever discussed the difference between a modular home, a prefabricated home, or a manufactured home, Ryan replied, "I don't believe we did." 2 CP at 264.

Furthermore, in his declaration in support of summary judgment, Ryan stated, "Brett Johnson approached me and requested that Alpine allow a *prefabricated* home on Defendants' lot." Ex. 71 at 2 (emphasis added). Ryan also declared, "In order to accommodate Mr. Johnson, and based on his express representations, [I] informed Mr. Johnson that he could place a *prefabricated* home, as long as it appeared site built and was of high quality." Ex. 71 at 2 (emphasis added). And, Ryan stated, "Mr. Johnson led me to believe that the company delivering

the *prefabricated* home was also providing the garage." Ex. 71 at 2 (emphasis added).

Yet, within his declaration, Ryan also stated, "Defendants moved into their *manufactured* home on or about February 14, 2001." Ex. 71 at 3 (emphasis added). Later in his declaration, Ryan stated, "Unfortunately, given the condition of the *prefabricated* home . . . sales activity have [sic] been minimal, at best." Ex. 71 at 4 (emphasis added). And Ryan repeatedly stated that the *manufactured* home violated the setback requirements in the covenants. Ex. 71 at 4 (emphasis added). Finally, in his supplemental declaration, Ryan alternatively referred to the Johnsons' home as a *modular* home and a *manufactured* home. Ex. 72 at 1, 2, 3 (emphasis added).

And at trial, the evidence showed that a distinction between the definitions of modular homes and prefabricated homes may not even exist. Marlan Morat, a witness for the Johnsons, testified that modular homes are a subcategory of "prefabrication" homes. 3 RP (Mar. 30, 2004) at 296. Sciacca, another witness for the Johnsons, testified that the difference between a modular home and a prefabricated home is "a play on words." 9 RP (May 25, 2004) at 1050. And Ray Wagner, an architect for TLC Modular Homes, testified, "Well, that's what a modular home is, it's prefabricated in the factory." 10 RP (May 26, 2004) at 1184. Finally, counsel for the Weiss-Millers suggested that although the statutes and building codes treat modular homes and manufactured homes differently, "They're all prefabricated." 6 RP (May 24, 2004) at 659.

Based on this substantial evidence, the trial court correctly found that Alpine intended to draw no distinction between modular homes and prefabricated homes.

Furthermore, substantial evidence refutes Ryan's claim that he never considered, nor

made, an exception for the Johnsons' home. First, Mr. Johnson testified that on April 22, 2000, he and his wife met with Ryan and discussed "what we were wanting to do, what we were building, everything from the size of the house, the dimensions of the house . . . what it would look like." 7 RP at 748. Mr. Johnson testified, "This would have to be okayed by [Ryan] if we were to sign this earnest money. And he okayed it." 7 RP at 748. "Oh, [Ryan] was real agreeable. Just everything was yes, yes, yes, no problem, looks great. You know, he -- we showed him the list, the materials list, how the house would look. It was going to be a rancher with a daylight basement." 7 RP at 754-55.

In his supplemental declaration in support of summary judgment, Ryan argued that "the 'plans' referenced by Mr. Johnson were, in actuality, 'floor plants' [sic]." Ex. 72 at 2. Nevertheless, Ryan admitted that he "did review several sets of floor plans prior to Defendants' placement of the modular home." Ex. 72 at 2. And Ryan admitted that "Brett Johnson and I discussed Defendants' placement of a modular home on the lot prior to closing of the sale of the lot." Ex. 72 at 1.

But because the covenants at that time did not allow an exception for prefabricated homes, the Johnsons sought to change the covenants. And Ryan testified, "I gave them conditions. I told them that I would consider it, if they complied." 3 RP at 326-27. Ryan again testified, "I said that if -- I would consider it, if they -- if it -- if they -- I would consider -- I gave them some guidelines and said I would consider it, if it met the guidelines." 3 RP at 328. Thereafter, Ryan amended the covenants to allow an exception for prefabricated homes.

At trial, Alpine tried to assert that it had amended the covenants for Arnie Preban and not for the Johnsons. According to Alpine, this amendment was to allow the Prebans to place a prefabricated home on their lot. But Preban testified that: (1) he had not sought to amend the covenants to allow prefabricated homes; (2) he did not have any plan to build a prefabricated home at the time in question; and (3) he had not picked out any plan to build a home at the time in question. On cross-examination, Ryan admitted that he never saw the Prebans' building plan until 2002.

Based on this substantial evidence, the trial court correctly found that Ryan "knew that the Johnsons were going to place a pre-fabricated home on the property." 5 CP at 920.

D. Vinyl Siding

Alpine argues that the trial court erred in finding that the Johnsons' vinyl siding was channel or horizontal lap siding; Alpine also argues that the trial court erred in concluding that the vinyl siding did not violate the covenants. The main question here is whether the covenants' reference to "channel or horizontal lap siding" includes the Johnsons' vinyl siding.

Article 2, paragraph 3 of the covenants states in part:

> The exterior construction of all dwelling structures shall be double wall construction on all sides of the home with channel or horizontal lap siding, brick, masonry, or Cedar as the preferred siding material for home construction within the Properties. Said materials shall be used unless a substitute material is reviewed and approved by the Developer or Homeowners Association. T-111 siding shall be excluded under all circumstances.

Ex. 7 at 3.

Alpine argues that the trial court's findings of fact do not consider the purpose of the

covenants to maintain property values in the subdivision. Alpine argues that vinyl siding is cheaper and is of lower quality than brick, masonry, or cedar. Finally, Alpine argues that vinyl siding is neither overlapping nor interlocking.

In considering Alpine's arguments, the trial court initially found the term "channel or horizontal lap siding" to be ambiguous. 5 CP at 921. But Dennis Webe, a witness for the Johnsons, testified that the Stevenson community would consider the Johnsons' vinyl siding to be horizontal lap siding. And on cross-examination, Webe testified that the vinyl siding is interlocked and overlapped. Even Mr. Johnson testified that the vinyl siding overlaps and interlocks. Thus, based on this evidence, the trial court found that "the Johnsons' siding is standard vinyl siding, channel-locked, and horizontal, and that it is channel or horizontal lap siding." 5 CP at 921.

Whether the testimony of Mr. Webe and Mr. Johnson alone is substantial evidence to support the trial court's findings of fact, the Johnsons nevertheless argue that the language of the covenants cannot be read to exclude horizontal lap siding, whether made of vinyl, cedar, or any other common type of siding. We agree.

In its summary of argument, Alpine states that the covenants "forbid vinyl siding; the Johnsons' home has shiny vinyl siding which is not permissible under the [covenants]." Br. of Appellant at 18-19. In addition, in its issues pertaining to assignments of error, Alpine asks, "Did home owners [sic] violate the [covenants] requiring channel or lap siding, *preferably* brick, masonry, or cedar, when they erected a modular home with vinyl siding?" Br. of Appellant at 3-4

(emphasis added). The Johnsons note that this interpretation would allow channel or lap siding *consisting* of preferably brick, masonry, or cedar. But this interpretation leads to an absurd result with regard to brick and masonry.

Instead, the Johnsons argue that the covenants, as written, allow for the following siding choices: (1) channel; (2) horizontal lap; (3) brick; (4) masonry; or (5) cedar. According to the Johnsons, all these choices are preferred. And while T-111 is specifically excluded, vinyl siding is not excluded or even mentioned in the covenants.

Giving the covenants' language an ordinary and common meaning, the trial court agreed with the Johnsons' interpretation, finding that "this vinyl siding does not violate the [covenants], because it is channel, it is horizontal, and vinyl is not prohibited by the [covenants]. Therefore, there was no violation of that particular provision." 5 CP at 921.

Finally, Alpine argues that the trial court erred in concluding that Alpine was equitably estopped from enforcing article 2, paragraph 3.[6] Because the covenants do not exclude the Johnsons' vinyl siding,[7] we do not address this argument.

E. Setback Requirements

Alpine argues that the Johnsons' home violates the covenants' setback requirements. Alpine argues that the trial court erred when it found this language to be "ambiguous as to what constituted a 'hillside.'" Br. of Appellant at 36-37.

Article 2, paragraph 11 states in part:

[6] Alpine incorrectly cites to article 2, paragraph 10.

[7] After this dispute, Alpine amended the covenants to prohibit vinyl siding.

> **All dwellings and structures will observe a one hundred feet (100') set back from all hillsides, specifically but not restricted to, the southern hillsides on the lower portion of the properties. Grading or excavating into any hillside is strictly prohibited except for approved driveways.**

Ex. 7 at 4.

Because this subdivision is located in a landslide control area, Skamania County required a geo-tech survey for each individual lot in order to determine the proper placement of the home. The Johnsons requested such a survey and Devry Bell, of Bell Design, performed a geo-tech survey on the Johnsons' property. The survey's results required that the placement of the Johnsons' home should be maintained in a horizontal distance of two times the vertical depth of the escarpment, plus 10 feet, from the "toe," or bottom of the escarpment on the southern half of the Johnsons' property. 3 RP at 357; 7 RP at 819-20. Thus, the Johnsons placed their home 130 feet north of the toe of the escarpment on the southern half of their property.

Also, Skamania County required that the subdivision's homes be placed no further than 50 feet from the centerline of the road to the north of the Johnsons' property. The Johnsons placed their home 57 feet from the centerline of this road.

In the beginning of this dispute, Alpine alleged that the Johnsons' home violated the covenants because it was within 100 feet of the seven-foot high road embankment to the north of the Johnsons' property. Even though the Johnsons could not place their home further south because the geo-tech survey determined it was too close to the escarpment, Alpine responded, "Irrespective of whether a geological survey or other engineering sources required placement of the home where it was, Defendants purchased the lot knowing full well what the [covenants]

required." 1 CP at 115.

At trial, though, Alpine tried to elicit testimony from Richard Bell that the Johnsons had placed their home too far south, within 100 feet of the top of the escarpment to the south of the Johnsons' property. In order to make this argument, Alpine abandoned its earlier argument that the Johnsons' home violated the covenants because it was within 100 feet of the road embankment to the north of the Johnsons' property.

But on cross-examination, Bell admitted that he had no knowledge of the relevant ordinances or setbacks for the road or the escarpment. In fact, with regard to one of the setbacks depicted on an exhibit, Bell admitted that Alpine's counsel simply asked him "to make that on the drawing." 1 RP (Mar. 29, 2004) at 43. Bell also admitted that he had erred in drawing this exhibit.[8]

Finally, the Skamania County building inspector testified that he was not aware of any violations with respect to county ordinances or the setback requirements.

Based on this substantial evidence, the trial court correctly found:

> "Hillside" is not defined in the [covenants]. On the property in question it would be difficult to tell what is a hillside, where the hillside starts, and where it stops. Nor do the [covenants] state whether the "100 foot setback" means from the top of the hillside, the middle, or from the toe of the hillside.
>
> . . . .
>
> Because the [covenants] are ambiguous again, and because the location of the house meets the requirements for safe placement as defined by the County, and also by Mr. Bell's geo[-]tech survey, there is no violation of the [covenants] with respect to the [sic] where the house was placed on the lot.

[8] In their reply brief, Alpine still relies on this exhibit for their argument that the Johnsons' improperly sited their home.

5 CP at 921-22.[9]

The trial court did not err.

F. Garage

Alpine argues that the trial court erred in finding that the Johnsons complied with the covenants by having their garage oriented away from the roadway.

Article 2, paragraph 3 of the covenants states in part, "Each dwelling shall be constructed with an attached and fully enclosed garage sufficient in size and design to house at least two full-size automobiles. A Carport in lieu of a garage is prohibited. Garages should be designed to open to the side of the house if at all possible." Ex. 7 at 3. Article 2, paragraph 10 of the covenants states in part:

> Wherever possible, buildings should be oriented so that the access is indirect, and garage openings do not directly face the road. From the garage, drives should move toward the roadway following the natural contours of the site. The surface of an access drive may not exceed 14 feet in width where it crosses the road right-of-way and the front setback of the lot.

Ex. 7 at 4.

After the Johnsons completed their home in 2001, Ryan advised them that their planned garage directly opened onto the subdivision's road. Ryan told the Johnsons that "they couldn't face the road. That [they] had to put them on the end of the house." 4 RP (Mar. 30, 2004) at 416. The Johnsons agreed to Ryan's request and rotated the garage 90 degrees; the planned garage now opened to the side of the house. Mr. Johnson testified, "And in talking with him, this

[9] Both Alpine and the Johnsons dispute whether the erosion control measures were adequate. But neither party has appealed this finding of fact. Thus, it is a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

is -- I thought, was going to be an agreeable -- he okayed it. Great. It wasn't a big deal to change it. It wasn't any cost. It hadn't been built yet." 5 RP at 618.

In his deposition, Ryan stated, "It was changed. Well, it still faces the road, but it doesn't come in from the front." 2 CP at 328. In response to whether the location of the garage was objectionable, Ryan stated, "It's objectionable, but I agreed to it." 2 CP at 328.

Based on this evidence, the trial court correctly found, "Mr. Johnson complied by having the garage design changed so that the doors opened to the side, which is required by the [covenants]. . . . As they were built, the garage doors can be seen from driving up the roadway, but do not face the street directly." 5 CP at 918-19.[10] There was no error.

G. Appearance and Upkeep of Property

Alpine argues that the trial court erred in finding: (1) that the Johnsons did not violate the restrictions about property maintenance; (2) that the Johnsons' bulldozer did not violate the restriction against unsightly vehicles; and (3) that the Johnsons did not violate the restrictions associated with landscaping.

Specifically, Alpine argues that despite these restrictions, "the trial court dismissed the Johnsons' violations by evaluating compliance not from the time of Alpine's complaint, but at the time of trial." Br. of Appellant at 40.

1. Lot Maintenance

First, Alpine alleged that the Johnsons did not maintain their lot during the construction of

[10] The trial court also found that "the only way to have the garage face, so that the doors could not be seen at all, would be on the bottom side, which would be very difficult construction wise, since it is set on the side of a hill." 5 CP at 919.

their home. Article 1, paragraph 1 states in part, "Owners shall maintain their lots, dwellings and any and all appurtenances to the high standards of the development. Painting and landscaping must be kept in good order, condition and repair and lots must be kept clean, sightly and sanitary at all times." Ex 7 at 1.

Bill Sullivan, a witness for Alpine, testified, "It was an unsightly project. There was construction debris around." 6 RP at 702. Sullivan continued:

> Construction debris, I think there was -- oh, part of his vinyl siding was around. His bulldozer was out front. And because of my job, I thought that was kind of unattractive nuisance. But he had the -- just pieces of equipment around, pieces of wood, debris pushed up and placed.

6 RP at 702-03. Sullivan also testified that he never observed any "garbage type receptacle" on the Johnsons' property during construction. 6 RP at 703.

Similarly, Ryan testified that the Johnsons had "junk sitting around the lot." 2 RP at 157. He also testified that the Johnsons had "buckets and broken trees and just, in general, refuse all over the lot." 2 RP at 157.

On the other hand, in his affidavit in opposition to summary judgment, Mr. Johnson claimed:

> I have kept the premises clean and orderly. Soon after each phase of construction was complete, I removed any debris resulting from that activity. Mr. Ryan took the opportunity to stop by at the various times during construction when there actually was wood scraps, or construction materials, or anything else on the grounds. Construction was neat and orderly, with only the usual temporary collection of construction debris.

1 CP at 104. And even Ryan admitted that "a lot of that stuff . . . [has] been picked up by Mr.

Johnson." 2 RP at 157.

Regardless of the appearance of the Johnsons' property in 2004, the trial court still found, "During the building process, and during landscaping, there probably was rubbish and other materials, however, no more than was to be expected around a building site, and the court does not find that this was anything out of the ordinary." 5 CP at 923. In its oral decision, the trial court stated, "Well, of course during construction it was kind of a mess, but then construction lots are usually a mess." 10 RP at 1319.

Based on the evidence before it, the trial court correctly found that the Johnsons did not violate the restrictions about property maintenance.[11]

2. Unsightly Vehicle

Second, Alpine argued that the Johnsons' bulldozer was an unsightly vehicle under the covenants and that it was not allowed to be on the property. Article 1, paragraph 5 of the covenants states, "Parking of inoperable cars, junk cars, or other unsightly vehicles shall not be allowed on any lot or road or easement within the development except only within the confines of any enclosed garage. No auto dismantling allowed anywhere in development." Ex. 7 at 1.

At trial, Mr. Johnson testified that the bulldozer was necessary for clearing and "grubbing" the property. 7 RP at 768. He also testified that after the home and landscaping were completed, he made arrangements to keep the bulldozer out of sight. Mr. Johnson parked the bulldozer out of sight in some brush on the southern part of their property. In fact, Mr. Johnson testified, "But,

[11] In any case, this question should be moot. *See Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994). At the time of trial, the Johnsons' lot was in compliance with this alleged breach of the covenants and we can no longer provide effective relief to Alpine.

you know, you'd have to be within about a 50-foot section there, a certain spot, and you'd have to look for it. You couldn't -- driving by or looking, you wouldn't know it was there." 8 RP (May 25, 2004) at 1006.

But Ryan testified, "You can still see it from the road." 2 RP at 158. And Mr. Johnson testified that the bulldozer is colored "orange" and is "rusty." 8 RP at 1004. Then, shortly after the trial started, Mr. Johnson placed a brown tarp over the bulldozer. On cross-examination, Mr. Johnson stated, "You know, at the time I parked it, there was -- back in the fall, you could not see it. And I guess over the course of the winter, some foliage had fallen." 8 RP at 990. In response to why he bothered to place a brown tarp over the bulldozer and/or park the bulldozer in the brush, Mr. Johnson replied, "Uh, just don't want to deal with the complaints." 8 RP at 991. Finally, Mr. Johnson testified that he did not believe that the bulldozer was unsightly or that the bulldozer violated the covenants.

In its oral decision, the trial court stated:

> I know that . . . Washington law kind of goes all over the place now days as to whether or not how strictly they are to be construed.
>
> But at least covenants have to be clear and unambiguous so that somebody that's buying property, whether it's from the developer or whether it's somebody fifty years from now . . . , can look at the covenants and know what is prohibited, know what's allowed. And it's very important that the covenants be clear and unambiguous.
>
> The covenant says that there's no unsightly vehicles allowed in the subdivision, and that's certainly understandable. But then again, what is an unsightly vehicle? Somebody's unsightly vehicle might be somebody else's classical car. Some people like old tractors, some people like old bulldozers, although most people wouldn't want their neighbors having them sitting in their front yards for a long period of time.
>
> . . . .
>
> In this case, if the bulldozer were sitting there forever in the front yard, I

> could find that there was a violation. . . . At this time the bulldozer is no longer in sight, and I cannot find that the Johnsons are in any violation at this time for having any unsightly vehicle. . . . And I can't find that this particular item was there any longer, reasonably longer than it needed to be.

10 RP at 1311-12.

Here, we hold that the trial court erred in entering its corresponding finding of fact. The ordinary and common meaning of the word "unsightly" is not ambiguous in regard to the Johnsons' bulldozer. *See* Webster's Third New International Dictionary 2510 (1969).

First, the bulldozer is orange and rusty; neither the machine nor the color blends with the natural landscape. Second, Mr. Johnson admitted that he placed a brown tarp over the bulldozer because he did not want "to deal" with the complaints. 8 RP at 991. Presumably, Mr. Johnson was trying to hide the bulldozer because he knew that it was "unsightly."[12] Third, although not on the front yard, the Johnsons' bulldozer has been sitting on their property for a long period of time after their home and garage were completed. In fact, construction on their property ended in 2002. In contrast to what the trial court stated, the bulldozer *was* there unreasonably longer than it needed to be. Finally, the covenants do not make an exception for an unsightly vehicle that is out of sight, covered with a tarp, and hidden by brush. The covenants permit an unsightly vehicle "only within the confines of any enclosed garage." Ex. 7 at 1. Thus, as to this issue, we hold that there was error and that the covenant was violated. And Johnson should remove the bulldozer.

3. Landscaping

[12] Otherwise, if he believed the bulldozer did not violate the covenants, he could have parked the bulldozer in plain view on his property.

Third, Alpine argues that the trial court erred in finding that the Johnsons did not violate the covenants with respect to landscaping. Alpine argues that the trial court implicitly conceded that the Johnsons did not meet the requirements of the covenants related to landscaping.

Article 2, paragraph 9, states:

> All dwellings and outbuildings must be landscaped within a fifty-foot (**50'**) radius of the structure; landscaping work must be completed within ninety (**90**) days from owner's possession. Extensions will be granted for weather conditions, which prevent installation of plant materials or other landscaping improvements. Areas left in their natural state and lots prior to construction must be kept free of noxious weeds and field grass must be mowed at sufficient intervals to prevent a fire hazard.

Ex. 7 at 3.[13]

[13] Article 1, paragraph 1 also states in part, "Painting and landscaping must be kept in good order, condition and repair and lots must be kept clean, sightly and sanitary at all times." Ex. 7 at 1.

At trial, Ryan testified that the Johnsons did not have any landscaping as of December 2001.[14] He did note that the Johnsons landscaped their front yard in 2002. But, until August of 2003, the Johnsons "still hadn't done anything with the backyard or the side yard." 2 RP at 168. Ryan noted that this activity coincided with the setting of this trial in August 2003. And, as of the trial, Ryan stated that the Johnsons still had not properly landscaped the backyard or the side yard of their lot. Even Mr. Weiss testified that the landscaping as of the trial appeared "pretty raw." 7 RP at 719-20.

But Mrs. Johnson testified that they planted grass, shrubs, and wildflowers around the lot. And both Mr. and Mrs. Johnson testified that they wanted to leave much of the lot in its natural state. Because they were having so many problems with weeds, they ultimately decided to plant more grass around the lot.

In its finding of fact, the trial court stated, "The Court notes that it is almost impossible in the area to meet a 90 day requirement on landscaping. The [covenants] did not define 'landscaping' in any way. The court finds no violation of the [covenants] with respect to landscaping." 5 CP at 923. And, after viewing the property during the trial, the trial court found the Johnsons' lot "to be extremely neat, well-kept up, nicely landscaped, with nice yard and plantings." 5 CP at 922.

Based on the evidence before it, the trial court did not err in entering these findings of

[14] The Johnsons did not complete their basic landscaping until after their garage and deck had been constructed in late 2001 or early 2002, more than 90 days after they had taken possession of their home in March 2001.

fact.[15]

IV. Attorney Fees

In general, Alpine argues that the trial court's findings of fact, conclusions of law, and judgment do not support an award of attorney fees to the Johnsons.

At the hearing on attorney fees, the trial court stated that "the Defendants have submitted itemized attorney's fees." 11 RP (July 16, 2004) at 1380. The trial court also stated that "I find that the amount that they have requested [is] reasonable." 11 RP at 1380. The court further stated that costs, except for deposition fees, would be allowed. But the trial court never entered these statements as findings of fact and conclusions of law.

As Alpine correctly notes, Washington courts have repeatedly held that the absence of an adequate record on which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998).

But the Johnsons claim that we "can look to the trial court's oral decision or statements in the record to assist in interpreting the findings, or to supplement inadequate findings." Br. of Resp't at 48. The Johnsons rely on *Peoples National Bank v. Birney's Enterprises, Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

We do not agree. First, we have no written findings of fact and conclusions of law

[15] In any case, this question also should be moot. *See Westerman*, 125 Wn.2d at 286-87. At the time of trial, the Johnsons' lot was in compliance with this alleged breach of the covenants and we can no longer provide effective relief to Alpine.

regarding the attorney fees; thus, we cannot use the trial court's oral statements to interpret or to supplement absent findings of fact and conclusions of law. Second, the court in *Peoples National Bank* explicitly warned, "We will not tolerate the practice of incorporating a court's remarks into the findings. . . . We consider it the prevailing party's duty to procure formal written findings supporting its position." *Peoples Nat'l Bank*, 54 Wn. App. at 670.

More specifically, Alpine argues that the award of attorney fees for the Johnsons is unsupported because the trial court failed to make a finding that Alpine or the Weiss-Millers acted in bad faith.

Although article 4, paragraph 5 of the covenants allows the prevailing party "to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred," Alpine argues that article 4, paragraph 3 of the covenants exonerates lot owners for "act[s] and omissions done in good faith in the interpretation, administration and enforcement of this Declaration." Br. of Appellant at 42-43; Ex. 7 at 5.

On the other hand, the Johnsons argue that these two provisions cannot be read together because they are separate and inconsistent provisions. Citing *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995), the Johnsons argue that the specific provision qualifies the meaning of the general provision when there is an inconsistency between the two provisions.

We do not find the two provisions inconsistent. Construing the covenants in their entirety, article 4, paragraph 2 provides, "Any Lot owner or Association of Lot Owners shall have the right

to *enforce* by proceeding at law or in equity all restrictions, conditions, covenants, reservations, requirements, liens and charges now or hereafter imposed by the provisions of this Declaration." Ex. 7 at 5 (emphasis added). And article 4, paragraph 5 provides, "In the event suit or action is instituted to *enforce* any terms of this Declaration or to collect unpaid assessments. The prevailing party shall be entitled to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred." Ex. 7 at 5 (emphasis added). Nevertheless, article 4, paragraph 3 provides, "The Lot Owners shall not be liable to any person for act[s] and omissions done in good faith in the interpretation, administration and *enforcement* of this Declaration." Ex. 7 at 5 (emphasis added).

In other words, giving the covenants' language its ordinary and common meaning, the prevailing party under these covenants will be entitled to recover attorney fees and costs only where the other party has acted in bad faith.

Because the trial court did not enter any formal findings of fact or conclusions of law related to attorney fees or bad faith, we remand the award to the trial court to develop such a record. These findings of fact and conclusions of law should also address whether the Weiss-Millers acted in bad faith, as the trial court's award is also dependent on that finding.

Because the Johnsons are the prevailing party, we award them reasonable attorney fees and costs for responding to Alpine's appeal should the trial court find that Alpine acted in bad faith at trial.

V. The Weiss-Millers' CR 60 Motion

The Weiss-Millers appeal from the trial court's denial of their CR 60(b)(3) and (11) motion and the trial court's supplemental judgment against them for additional attorney fees.

We review the trial court's disposition of a CR 60(b) motion for abuse of discretion. *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 454, 922 P.2d 126 (1996), *review denied*, 131 Wn.2d 1010 (1997). An abuse of discretion occurs only where it can be said that no reasonable person would take the view adopted by the trial court. *Eagle Pac. Ins. Co.*, 85 Wn. App. 695, 709, 934 P.2d 715 (1997) (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)), *aff'd*, 135 Wn.2d 894 (1998). And the scope of review is generally limited to determining whether the trial court abused its discretion; an appeal from the trial court's disposition of a CR 60(b) motion does not bring the final judgment up for review. RAP 2.2(a)(10), 2.4(c).

First, the Weiss-Millers argue that we can reverse the trial court's order under CR 60(b)(3), which permits relief from a judgment due to "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." During argument on this motion, the Weiss-Millers argued that new evidence showed that the Johnsons violated the covenants by using their property for a commercial purpose and that the Johnsons continuously accumulated debris on their property.

We will not grant a new trial on the ground of newly discovered evidence unless the evidence: (1) will probably change the result of the trial; (2) was discovered after trial; (3) could

not have been discovered before trial even with the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Graves v. Dep't of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424 (1994).

In denying the Weiss-Millers' CR 60(b)(3) motion, the trial court stated, "I'll hear your argument about anything that happened prior to the trial, but not anything that happened after the trial because nobody could have known what happened after the trial." RP (March 3, 2005) at 4.[16] With respect to the Johnsons allegedly using their property for a commercial purpose, the trial court decided:

> The new evidence that is proposed to be -- the new evidence that's offered is evidence that supposedly the -- Mr. Johnson had -- was operating a used car business out of his -- out of his home. I might be mistaken, but I can't recall the initial Complaint alleged that there -- that was a violation of [the covenants]. I can't remember the whole time going to trial, that was never mentioned, so it's not like we had something that was -- was litigated and then there was new evidence coming in that, well, at the time of trial, we didn't know he was a car dealer and now we do. That wasn't even brought up at trial.

RP (March 3, 2005) at 22.

On appeal, the Weiss-Millers argue that although the *investigation* occurred after the trial, the newly discovered *evidence* occurred before the trial. Regardless of this distinction, we hold that the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(3) motion.

To begin, the Weiss-Millers did not satisfy the due diligence requirement of CR 60(b)(3). The initial phase of the trial lasted from March 29 until March 31, 2004; the trial was then

[16] The trial court correctly understood that CR 60(b)(3) applies to evidence existing *before* the trial, not *after* the trial. *See In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003) ("CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later.").

continued until May 24, 2004. The second phase of the trial lasted from May 24 until May 26, 2004. Clearly, the Weiss-Millers could have made a reasonable inquiry before the end of May that would have revealed the allegedly "regular changing inventory of vehicles in front of the Johnsons' residence." Br. of Appellant Weiss-Millers at 29.

Although the Weiss-Millers claim that Mr. Johnson was using his property for commercial purposes as a new or used car dealer, Weiss's affidavit is wholly insufficient to satisfy the requirements of CR 60(e).[17] To support the motion, Weiss claims that "it was ascertained that the vehicles observed by Mr. Weiss were in fact all owned by different individuals." Br. of Appellant Weiss-Millers at 29. Weiss also stated, "Through his own internet investigation Mr. Weiss ascertained that Mr. Johnson had some prior affiliation with First Choice Auto Sales." Br. of Appellant Weiss-Millers at 30. And Weiss stated that "the Department of Licensing indicated that Mr. Johnson had been observed driving a vehicle with an expired dealer's license registered to Horizon Auto Sales." Br. of Appellant Weiss-Millers at 30. Yet, even taken together, none of these statements proves that Mr. Johnson was using his property for commercial purposes as a new or used car dealer. In his affidavit, Mr. Johnson responded, "I have purchased several cars at the Portland Auto Auction, which had temporary Oregon license plates, but which are for the personal use of myself, my wife, my son and my daughter." CP (cause no. 33093-8-II) at 87. Mr. Johnson also stated, "I have a brother-in-law who had an auto dealership in Spokane, named Horizon Auto." CP (cause no. 33093-8-II) at 87.

[17] In part, CR 60(e)(1) states that the application for relief from judgment shall be "supported by the affidavit of the applicant . . . setting forth a concise statement of the facts or errors."

And, as the trial court correctly noted, the issue of whether the Johnsons violated the covenants by using their property for commercial purposes as a new or used car dealer "wasn't even brought up at trial." RP (March 3, 2005) at 22. Thus, this newly discovered evidence is not material to the trial.

With respect to the Johnsons allegedly accumulating debris on their property, the trial court was silent. Nevertheless, as the Johnsons correctly note, Ryan's observations occurred after the trial.[18] And, even if these observations had occurred before the trial, these observations would have been cumulative and probably would not have changed the result of the trial.

Based on this evidence, the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(3) motion.

Second, the Weiss-Millers argue we can reverse the trial court's order under CR 60(b)(11), which permits relief from a judgment due to "[a]ny other reason justifying relief from the operation of the judgment." They argue that "where, as here, appellants have relied to their detriment on advice of counsel in failing to file a timely notice of appeal, principles of equity should allow review of the courts [sic] findings and conclusions and judgment entered July 16, 2004." Br. of Appellant Weiss-Millers at 14-15.[19]

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[18] In his affidavit signed on February 4, 2005, Ryan stated, "Recently, I have observed that on the western slope of Mr. Johnson's lot he is accumulating debris including limbs and large trees, which creates a fire hazard and is a violation of [the covenants]." CP (cause no. 33093-8-II) at 79-80.

[19] The Weiss-Millers also argue that "this case involves patent material inconsistencies within the trial court's findings and conclusions and the evidence which in effect amounts to a situation which prejudices the movant as much as an irregularity in the proceedings, which clearly can justify relief from judgment under CR 60(b)." Br. of Appellant Weiss-Millers at 15-16. But this

But the use of CR 60(b)(11) is to be confined to situations involving extraordinary circumstances not covered by any other section of the rule. *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). "Such circumstances must relate to irregularities extraneous to the action of the court." *Yearout*, 41 Wn. App. at 902. Although CR 60(b)(11) has been invoked in unusual situations that typically involve reliance on mistaken information, *In re Adoption of Henderson*, 97 Wn.2d 356, 359-60, 644 P.2d 1178 (1982), generally the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action. *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028 (1996).

Here, the Weiss-Millers' attorney, acting on their behalf, appeared in a fully adversarial setting in which the merits of the case were fully addressed. For whatever reason, he neglected or refused to file an appeal, choosing instead to rely on an erroneous legal theory that Alpine's appeal was sufficient for the Weiss-Millers. Based on these circumstances, the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(11) motion.

Although we have remanded for a determination of bad faith on the part of the Weiss-Millers in bringing their claims at trial, we hold that the Weiss-Millers' appeal of the denial of their CR 60 motion was in bad faith; the Johnsons are entitled to an award of reasonable attorney's fees for the appeal. Not only was the Weiss-Millers' appeal in bad faith, but it was also frivolous under RAP 18.9. Upon compliance with RAP 18.1, the commissioner will award reasonable attorney fees and costs on behalf of the Johnsons for responding to the Weiss-Millers' appeal.

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argument is not justified under CR 60(b)(11) as it relates to irregularities.

Affirmed in part, remanded for entry of findings and conclusions regarding attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Hunt, J.

Van Deren, A.C.J.